

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.6425 OF 1988

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
  2. To be referred to the reporters or not ?
  3. Whether their lordships wish to see the fair copy of the judgment ?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
  5. Whether it is to be circulated to the Civil Judge?

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N.I. MEHTA

VERSUS

THE STATE OF GUJARAT AND ANR.

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Appearance:

The Petitioner present in person

MR DA BHAMBHANIA for the Respondents

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Coram: S.K. Keshote,J

Date of decision:20.3.97

C.A.V. JUDGMENT

The petitioner has appeared in this case in-person and on the last date, i.e. 9th January 1997,

he has completed his submissions and the matter has been adjourned for 18.1.97 for hearing of the arguments of learned counsel for the respondent. The petitioner had to undergo surgical operation and as such, he prayed on the last date for exemption of his personal appearance on 18.1.97, which was granted.

2. The petitioner who is an officer of Industries Department of State of Gujarat filed this petition before this Court and questioned therein, the legality, propriety and correctness of the order dated 11th August 1987 of the Government of Gujarat under which he was ordered to be prematurely retired. Otherwise also the petitioner would have retired on attaining the age of superannuation on 31st March 1989.

3. The facts of the case are that the petitioner entered into the service of the erstwhile State of Bombay as Malaria Supervisor in 1953. In 1957, he was transferred to Industries Department as Junior Industries Inspector. The petitioner was promoted to the post of Senior Industries Inspector, to Industries Officer, to the post of Assistant Commissioner of Industries and Deputy Commissioner of Industries. The petitioner was due for promotion to the post of Joint Commissioner of Industries, as what he stated that throughout his career, he was having meritorious service to his credit. The petitioner was promoted to the post of Industries Officer on 6.7.66, but before he could resume charge of the new post, his promotion was withheld. The petitioner has made a statement in the Special Civil Application that barring communication of adverse remarks in the year 1966-67 and 1967-68, no adverse remarks were communicated to the petitioner till 1986. The petitioner filed, in the year 1966, Special Civil Application No.1035 of 1966. During the pendency of the said petition, the petitioner was superseded by his juniors. This Court has passed the order in favour of the petitioner, but the respondents preferred L.P.A. No.142 of 1972 which has also been dismissed. The petitioner was directed by this Court to exhaust administrative remedies. The petitioner moved the authorities through number of representations, but as the authorities did not do justice to him, he filed Special Civil Application No.2457 of 1980 before this Court. In this petition, this Court has passed the order in favour of the petitioner directing the respondents to accord deemed date of promotion to the petitioner in the cadre of Industries Officer since August 1966. Further directions were issued to respondents to consider the case of petitioner for promotion to the post of Assistant Commissioner of Industries, Deputy Commissioner of

Industries and Joint Commissioner of Industries, taking into consideration his deemed date of promotion in the cadre of Industries Officer as August 1966. This Court has further directed the respondents to grant all consequential and monetary benefits in the event the petitioner is found suitable for promotion to different promotional posts as aforesaid. In pursuance of the order of this Court, the petitioner has been given deemed date in the cadre of Industries Officer by promoting him from 1st August 1966, but difference in the salary has not been paid. The petitioner states that he should have been given the deemed date of promotion in the cadre of Assistant Commissioner since February 1975 as against his actual promotion to the post of Assistant Commissioner in September 1977. Similarly, he stated that promotion to the post of Deputy Commissioner of Industries from May 1978 should have been given as against the actual promotion to the said post in June 1981. As the deemed date of promotion on the post of Assistant Commissioner and that of Dy. Commissioner has been corrected, he is entitled to be promoted to the post of Joint Commissioner of Industries on 22.3.82, the day when an officer, namely Shri H.M. Joshi, junior to the petitioner was promoted. As the directions of this Court given in Special Civil Application No.2457 of 1980 were not complied with fully, the petitioner has initiated contempt proceedings against the respondents.

4. The petitioner received two letters dated 3.1.86, communicating adverse remarks incorporated in the Confidential Report of the petitioner for the period from 1st April 1984 to 31st March 1985. In another letter of same date, the adverse remarks pertaining to part III of the Confidential Role were communicated. I shall deal with these remarks given to the petitioner at the appropriate stage in this judgment. The petitioner made a representation against those remarks vide his representation dated 6.2.86. Under the order dated 4.12.86, the Government of Gujarat expunged the adverse remarks pertaining to his character and temperament and relation with his colleagues and general public as well as with regard to exercise of delegated authority. As one of the adverse remarks was not expunged, the petitioner filed his representation dated 23rd December 1986 and 11th March 1987, seeking interview with the Secretary, Industries, Mines and Energy Department of the Government of Gujarat, Ahmedabad. The petitioner was called upon for interview as prayed for, by the Secretary on 13th May 1987. The petitioner appeared before the Secretary, Industries, Mines and Energy Department on 13.5.87, but before the result of the said interview was

communicated to the petitioner, he was ordered to be prematurely retired with effect from 13th August 1987 under the impugned order.

5. The Industries Commissioner, vide his letter dated 22nd September 1986, communicated the adverse remarks as incorporated in his Confidential Report for the year 1985-86. The overall assessment of the work was reported to be fair. It has further been mentioned in the said letter that whatever remarks given therein were not considered adverse and no representation would be entertained from the petitioner as the object of communicating those adverse remarks was to enable the petitioner to improve his performance. On the same day another letter has been received by the petitioner in which it was conveyed that his initiative, resourcefulness and willingness to assume responsibility was reported as "needs persuasion to entrust additional responsibility". His capacity to take a quick and sound decision was reported as "takes sound decision but sometimes refers cases for guidance". His character and temperament including relation with fellow officers and general public was reported as "needs improvement to get alongwith fellow officers and general public". The petitioner made a representation on 14th October 1986, but that has not been disposed of. The petitioner has challenged, the validity and correctness of the adverse remarks given to him in the Special Civil Application. The petitioner has also challenged the validity of the order of premature retirement on the ground that his case was not fairly and impartially considered. Only on the basis of one adverse remarks in one column wherein it has been reported that the petitioner requires persuasion for entrustment of additional responsibility, he has been considered to be a dead wood, which is a perverse approach. The sole object and purpose of the Government was to get rid of the petitioner without taking into account his work and performance. Against the order of premature retirement, the petitioner represented to the Secretary of the Department on 9th September 1987, but this representation came to be dismissed by the Government under letter dated 5.1.88. The petitioner made a representation to the Hon'ble Chief Minister of the State of Gujarat vide his representation dated 24th January 1988 and also prayed for granting him personal hearing. This request was turned down vide letter dated 6th September 1988. Hence this Special Civil Application before this Court. After filing of this petition, the petitioner made amendment in the Special Civil Application and few additional points have been raised.

6. The respondents filed affidavit in reply to which the petitioner has filed affidavit in rejoinder. The petitioner has filed written arguments and alongwith the same, he has also filed copies of judgments given by Hon'ble Supreme Court and by this Court. The petitioner filed many documents in support of his case.

7. I have called upon the respondent to produce the service record of the petitioner before this Court. The learned counsel for the respondents has given out the record in the form of gist of statements, which is taken on record. The statements showing service record of the petitioner, has been given from the year 1976-77 to 1986-87. In the year 1976-77, no adversity has been pointed out. In 1977-78, it has been stated that minor penalty of censure has been given to the petitioner under the order dated 9.9.77 and a copy of the said order has been enclosed. There is nothing adverse in the service record for the years 1978-79, 79-80, and 1980-81. In 1981-82 in his annual Appraisal Performance Report, part III thereof, at item No.4 (i) under the head "initiative resourcefulness and willingness to assume responsibility", it has been reported "O.K.". It has been mentioned in the statement that the petitioner was not conveyed anything adverse in this year. In 1982-83 in part III, column 10, the overall assessment of the petitioner has been mentioned as, "an ordinary type of officer". These remarks have been communicated to the petitioner on 12th September 1983, but the respondents have stated as a fact in the statement that these remarks were only suggestive remarks. In the year 1983-84 there was no adversity in the service record of the petitioner. Then comes the remarks of the year 1984-85. In part III, column 4(i) regarding initiative resourcefulness and willingness to assume responsibility, it has been remarked as, "needs persuasion to entrust additional responsibility", and in column 4(iv) regarding Character & temperament including relation with fellow officers and general public, it has been mentioned as, "needs improvement to get alongwith fellow officers and general public". Again, under column 5, under the head, "has he properly exercised delegated powers or does he have a tendency to refer cases back for guidance?", it has been remarked as, "Yes, but sometimes, refer cases for guidance". In part III, columns No.2, 4(ii) and 4(iii), under the heads, namely, "what is your assessment of his clarity of thought and power of expression on paper", "capacity for organisation and to get work from subordinate", and "capacity to take quick and sound decision" respectively, the remarks have been given as "fair" for all three columns, i.e. column No.2, 4(ii)

and 4(iii). Under column No.10 entitled "overall assessment" it has been remarked as "an average officer". The petitioner was communicated with these remarks for the year 1984-85 on 3.1.86. So far as second part of the remarks, i.e. remarks under columns No.2, 4(ii), 4(iii) and 10, is concerned, it has been mentioned in the said statement that these remarks are "suggestive remarks". Out of the first part of three remarks, i.e. remarks under columns No.4(i), 4(iv) and 4(v), on the representation made by petitioner, under the Government order dated 27.10.86, the remarks under column 4(i) were retained, but the remarks against columns 4(iv) and 4(v) were cancelled. Then comes the year 1985-86 and the remarks which have been given for this year, under different heads, are as under:

1985-86: Part-III

4(1) Initiative resourcefulness and willingness to assume responsibility:

-- Needs persuasion to entrust additional responsibility

4(3) Capacity to take quick and sound decision:

-- Take sound decision but sometimes refer cases for guidance

4(4) Character and temperament including relation with fellow officers and general public:

-- Needs improvement to get alongwith fellow officers and general public

4(ii) Capacity for organisation and to get work from subordinates

-- Fair

4(iv) Character and temperament including relation with fellow officers and general public

-- Fair

10 Overall assessment

-- Fair

1985-86 Part IV

4 Overall assessment including mention of  
outstanding work, if any

-- A good officer but in Amreli Dist.

provided too little by way of challenge

The remarks at column No.4(ii), 4(iv) and 10 were reported to be fair and they were communicated under the head, "suggestive remarks". So far as the remarks under columns 4(1), 4(3) and 4(4) are concerned, those remarks were communicated to the petitioner against which a representation has been filed by the petitioner, which has admittedly been not decided. So far as remarks under column No.4, part IV are concerned, they were not communicated to the petitioner.

8. The remarks for the year 1986-87, in the Annual Appraisal Report of the petitioner reads as under:

1986-87 Part IV

4 Overall assessment including mention of  
outstanding work, if any

-- A barely adequate officer. His  
improvement in controlling his temper is  
not complete by any means.

Those remarks have not been communicated to the petitioner and the reason has been given that the petitioner was ordered to be compulsorily retired from 13.8.87.

9. The facts which are not in dispute are that the petitioner was allowed to cross Efficiency Bar on the post of Deputy Commissioner, Industries, with effect from 1.6.84 under the order of Industries, Mines & Power Department, dated 30th October 1984. The petitioner was given deemed date of promotion on the post of Assistant Commissioner from 1.3.75 and on the post of Deputy Commissioner from 1.5.78. These deemed promotions were given to the petitioner under the order dated 24.11.88 of the Government, i.e. after his premature retirement. The petitioner was promoted to the post of Joint Commissioner under the order dated 4.11.89 from 4.4.85. The petitioner was not satisfied with that promotion and he filed Special Civil Application No.12549 of 1993 before this Court and prayed for giving him the deemed date of promotion to the post of Joint Commissioner from 22nd March 1982. That Special Civil Application came to be allowed by this Court under the order dated 8.4.96 and direction was given to consider the case for deemed date of promotion, and thereafter under the order dated 30th

July 1996, the petitioner was given deemed date of promotion on the post of Joint Commissioner from 22nd March 1982. It is also not in dispute that promotion on the post of Deputy Commissioner of Industries and Joint Commissioner of Industries are to be made on the basis of proved merits and efficiency.

10. The petitioner contended that the order of the Government to prematurely retire him from the services has not been made in public interest. It has further been contended that taking into consideration the totality of the facts of this case, that decision of the Government to retire the petitioner prematurely cannot be said to be fair and impartial. The service record of the petitioner is not that much bad as he may be considered to be a deadwood and should have been chopped off. Carrying further the contention on merits of adverse remarks given to him, the petitioner contended that there was no basis whatsoever for those remarks and even if those remarks are taken to be adverse, then there is nothing reported against him of his integrity as well as his character, honesty, diligence, hard work, sincerity, etc. In support of his contentions, the petitioner placed reliance on many of the decisions of Hon'ble Supreme Court and this Court and xerox copies thereof has also been produced on the record. Lastly, the petitioner contended that one or two stray adverse remarks here and there in the service record should not have been considered while making overall assessment of his service record. The petitioner was promoted on the post of Industries Officer, Asstt. Commissioner, then on the post of Deputy Commissioner and lastly on the post of Joint Commissioner of Industries, which shows that he was a meritorious officer. The grievance of the petitioner is that the compulsory retirement has been ordered only as the petitioner has raised voice against injustice which has been meted to him by the Department by filing Special Civil Applications from time to time before this Court as well as also by initiating Contempt proceedings. He was not given promotion to the aforesaid posts when his turn came and that is the reason he has to complaint before this Court and his cases were accepted and ultimately the respondents have corrected the date of his promotion on the aforesaid posts. In the written arguments, the petitioner has raised manifold arguments in support of his case.

11. On the other hand, the learned counsel for the respondents, Shri Bhambhania contended that it is a subjective satisfaction of the authority on which this Court will not sit as an Appellate Authority. It has



next been contended that in the matter of compulsory retirement, this Court has very very limited judicial power of review and if there is some material on record to form the opinion against the petitioner to retire him prematurely, the said decision does not call for interference of this Court under Article 226 of the Constitution of India. However, the learned counsel for the respondent fairly conceded the facts which have been stated by the petitioner and which I have noticed above in this judgment. In support of his contention, the learned counsel for the respondent placed reliance on the following decisions of the Hon'ble Supreme Court:

AIR 1992 SC 1020 -- Baikuntha Nath Das and Anr.  
v. Chief District Medical Officer, Baripada and Anr.

AIR 1994 SC 1261 -- Union of India v.V.P.Seth and Anr.

AIR 1996 SC 2436 -- State of Orissa & Ors.v. Ram Chandra Das

12. I have given my thoughtful considerations to the submissions made by the learned counsel for the parties.

13. The statement showing the details of adverse remarks in the confidential report of the petitioner from the year 1976-77 to 1986-87 gives out that for all these years, there was only an adversity of minor penalty of censure vide order dated 9.9.77 given to the petitioner. So far as the adverse remarks are concerned, there were no adverse remarks from the year 1976-77 to 1980-81 and same state of affairs may be accepted for the year 1981-82. In the year 1982-83, nothing adverse has been reported against the petitioner. The overall assessment was, "an ordinary type of officer" which has been communicated to the petitioner under the head, "suggestive remarks". So in this year also, there was no adversity. Admittedly, in the year 1983-84, nothing adverse has been reported against the petitioner. In the year 1984-85, three remarks were made against the petitioner. It is not in dispute that out of which, two remarks of columns No.4(iv) and 4(v) in part-III were expunged. The remarks made in column No.2, 4(ii), 4(iii) and 10 were communicated to the petitioner, which were reported to be fair and the petitioner's overall assessment was made as, "an average officer". It is significant to note that those remarks aforesaid were communicated to the petitioner under the head, "suggestive remarks". So in the year 1984-85, there was only one adverse remark namely, i.e. "needs persuasion

to entrust additional responsibility", under column 4(i) of part III.

14. If we go by remarks for the year 1985-86, even then, the remarks contained in column No.4(ii), 4(iv) and 10 of part III were reported to be 'fair' and they were communicated under the head "suggestive remarks". So far as the remarks under column No.4(1), 4(3) and 4(4) are concerned, though the same were communicated to the petitioner, but admittedly the representation filed by him against these remarks has not been decided. The overall assessment in part III of the report was reported to be fair. So far as part IV of the year 1985-86 is concerned, the overall assessment was made to be, "a good officer, but in Amreli District provided too little by way of challenge". It is not in dispute that for the year 1986-87, remarks were given, "a barely adequate officer. His improvement in controlling his temper is not complete by any means." But these remarks have not been communicated to the petitioner as he was ordered to be retired compulsorily on 13.8.87. So, in all, this is the totality of adversity against the petitioner. It is an admitted case of respondent that the petitioner was allowed to cross Efficiency Bar with effect from 1.6.84. So, the un-expunged adverse remarks for the year 1984-85 were not treated as adverse and very serious by the Department itself. Then comes the promotion of the petitioner as Joint Commissioner of Industries with effect from 4.4.85 after considering the service record which is inclusive of confidential report for the year 1984-85. It is true that promotion has been given after compulsory retirement of the petitioner but with effect from 4.4.85. The petitioner was not fully satisfied with this promotion as he was claiming promotion from 22.3.82 and as such, he filed Special Civil Application 12549 of 1993 before this Court which came to be accepted and directions were given to the respondents to consider the representation of the petitioner. The representation of the petitioner was found favour with the Department and he was ordered to be promoted to the post of Joint Commissioner of Industries with effect from 22.3.82. From the facts which have given out by petitioner in Special Civil Application as well as written arguments it is clear that injustice was meted to the petitioner from time to time and he was compelled to approach this Court. The second petition has been filed by him, being Special Civil Application No.2457 of 1980 which was decided on 14th October 1987, i.e. after his compulsory retirement. The grievance of the petitioner in the Special Civil Application seems to be that he was not given promotion in different cadres at appropriate time. The decision of

this court was given effect to only after the petitioner filed the Contempt Petition and from the written arguments at page 185, it is borne out that his date of promotions on the post of Industrial Officer, Assistant Commissioner of Industries, Deputy Commissioner of Industries were suitably modified. The petitioner was also given promotion to the post of Joint Commissioner of Industries. The details of the same are as under:

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CADRE     ACTUAL     DEEMED  
DATE OF     DATE OF  
PROMOTION PROMOT-  
ION  
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Industries Officer     14.8.1974     1.8.1966

Asstt. Comm. of Industries Sept. 1977     1.3.1975

Dy. Comm. of Industries     20.6.1981     1.5.1978

Jt. Comm. of Industries     4.4.1985

vide  
order dt.  
4.11.1989

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15. The third litigation has been taken by the petitioner regarding his deemed date of promotion on the post of Joint Commissioner of Industries from 22.3.82. The first petition has been filed by the petitioner challenging therein the vindictive attitude of the Government in the year 1966 being Special Civil Application No.1035 of 1966 which has been decided in his favour and the LPA filed by the Government against the said decision has also been rejected. So there seems to be some justification in the say of the petitioner that because of litigations which have taken from time to time for redressal of grievance by the petitioner before this Court, he was ordered to be compulsorily retired from the services.

16. Though the adverse remarks against which the representation is pending could have been considered for deciding the matter whether the petitioner should be prematurely retired or not, but in the facts of the present case, more so when there was only one remark which was not of serious nature, the representation filed by the petitioner against the adverse remarks of 1985-86

should have been decided. Propriety desires so in the present case that the representation against the adverse remarks for the year 1985-86 should have been decided before taking any decision against the petitioner.

17. The adverse remarks communicated to the petitioner for the year 1984-85 are same and similar as compared to the adverse remarks incorporated in the Confidential Report for the year 1985-86, of the petitioner. In both these years, the remarks are, "needs persuasion to entrust additional responsibility". If we go by the remarks, even very closely and minutely, these do not seem to be serious in nature on the basis on which a man of reasonable prudence could have taken decision to compulsorily retire the petitioner in public interest. The petitioner cannot be said, on the basis of these remarks, a dead wood which should be chopped off in the public interest. Moreover, it is not forthcoming from the reply of the respondents that the petitioner, at any point of time, refused to accept additional responsibility. The report specify additional responsibility, which means that the responsibility beyond what is normally entrusted to the petitioner. The petitioner was put in additional charge of District Industries Centre, Bhavnagar in addition to his duty as General Manager, District Industries Centre, Amreli and he has been discharging his additional duties and additional responsibility with effect from 5.1.87 to 5.3.87. Though this is subsequent period, but it gives out that as and when additional responsibility was put upon the petitioner, he has successfully carried the same also. In the year 1979, the petitioner was posted at Ahmedabad and there was a devastating flood in Morbi. The petitioner was deputed to attend the rehabilitation work there. The performance of petitioner attracted the attention of Industries Commissioner, who commended the degree of enthusiasm and zeal on the part of the petitioner. The letter of the Industries Commissioner has been filed by the petitioner, which is at annexure 'J' to this petition which reads as under:

"...The disaster at Morvi on 11th August '79 created an unprecedented situation when the Department had to take urgent and effective measures to rehabilitate the affected industries and trade. In the massive efforts launched by the Department to rehabilitate the industries and trade, you played a constructive role and participated with commendable degree of enthusiasm and zeal.

I am writing this letter to you to record my sense of appreciation of your work. A copy of this letter is also being placed in your C.R. file...."

18. In June 1983, the petitioner was posted as General Manager, District Industries Centre, Jamnagar, when there was a devastating flood and cyclone in Junagadh District. The petitioner was entrusted one of the worst affected pockets, namely, Porbandar, and he attended the said work in addition to his duty as General Manager, District Industries Centre, Jamnagar. As a matter of fact, the jurisdiction of the petitioner as General Manager, District Industries Centre, Jamnagar, was extended to cover Porbandar Sub Division. There was a General Manager, District Industries Centre, Junagadh, but the petitioner was entrusted the work of Porbandar Sub Division.

19. I find sufficient justification in the say of the petitioner that it has been done because the work and performance of the petitioner was considered to be outstanding. In para 12 of the Special Civil Application, the petitioner made a statement on oath that, "at the relevant period, i.e. 1984-85 and 1985-86, there was no occasion for additional responsibility and in view of that, the said remark is without reference to the facts. The respondents have filed reply to the Special Civil Application but they have not denied the fact that there was no occasion at the relevant period, i.e. 1984-85 and 1985-86 for additional responsibility to be assigned to the petitioner. It is a case of compulsory retirement and when there was the only remark of the nature that the petitioner needs persuasion to entrust additional responsibility, it was obligatory on the part of the respondents to come out with a definite case in support of these remarks. The matter would have been different where the additional responsibility was given to the petitioner but when at no point of time, during the period 1984-85 and 1985-86, additional responsibility was given to the petitioner, how far these remarks can be said to be justified. Moreover, in the reply, the respondents have not given out that at any point of time earlier to the communication of adverse remarks for the year 1984-85 and 1985-86, the petitioner has been given out in writing regarding his performance as well as alleged defects in his working which now reflects from the said remarks.

20. The learned counsel for the respondents has cited three decisions in support of his contention, which I

consider it appropriate to refer them here. In the case of Baikuntha Nath Das and Anr. v. Chief District Medical Officer, Baripada and Anr., reported in AIR 1992 SC 1020, the Hon'ble Supreme Court held that the order of compulsory retirement is not a punishment and it neither implies stigma nor suggestion of misbehaviour. The order of compulsory retirement has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government Servant compulsorily. The order is passed on the subjective satisfaction of the Government. The Government or review committee shall have to consider the entire record of service before taking a decision in the matter -ofcourse attaching more importance to record and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lost their sting, more so, if the promotion is based upon merit (selection) and not upon seniority. It has further been observed that order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Principles of natural justice have no place in the context of an order of compulsory retirement. As the nature of the function is not quasi-judicial in nature and because the action has to be taken on the subjective satisfaction of the government, there is no room for importing the said facet of natural justice in such a case, more particularly when an order of compulsory retirement is not a punishment nor does....R

Court has further observed that this does not mean that judicial scrutiny is excluded altogether. While the High Court and the Supreme Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed (i) malafide, and (ii) that it is based on no evidence, or (iii) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material in short; if it is found to be a perverse order.

21. The next decision is the case of Union of India v. V.P.Seth and Anr., reported in AIR 1994 SC 1261. In para 3 of the judgment, the Hon'ble Supreme Court has observed that:

"These principles were reiterated with



proper decision in that behalf. As stated earlier, it is settled law that the government is required to consider the entire record of service. Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that self-same material after promotion may not be taken into consideration only to deny him further promotion, if any, but that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the Government servant in service after he attained the required length of service or qualified period of service for pension...."

23. In the adverse remarks incorporated in the Confidential Report of the petitioner for the year 1985-86, the remark of 4(iv) in part III as communicated vide D.O. No.IO/EST/ACR/85-86/GO/1072, the remarks have been stated as 'fair' against the column, "Character and temperament including relation with fellow officers and general public", whereas under the communication dated 22.9.86, against the same column, i.e.4-4, and for the same year, the remarks have been stated as, "needs improvement to get alongwith fellow officers and general public". So, the conclusion reached by the officer in view of the above remarks is obviously incorrect. The other remarks for the year 1985-86 in the column No.4-3, in the aforesaid letter dated 22.9.86, was, "Capacity to take quick and sound decisions", against which it has been remarked as, "takes sound decisions but sometimes refers cases for guidance". So, nothing has been reported adversely against the petitioner of his capacity to take quick decisions. So far as his capacity to take sound decisions is concerned, a positive remark has been given, i.e., "takes sound decisions". So, no doubt whatsoever has been raised on the capacity of the petitioner to take quick and sound decisions, but even if sometimes the petitioner referred cases for guidance to the higher officer, I fail to see how it can be said to



be an adversity in the service record of the petitioner. If an officer who has sufficient capacity to take quick and sound decisions sometimes feels that guidance of higher officers in the matter is necessary, then it goes in his favour, and it cannot be taken to be any adversity in his performance. It is expected of the officers also where they have some doubt in their own decisions, to take guidance from higher officers. In case such a course is adopted by petitioner, I fail to see how it can be taken as some default or error or some lacking in his performance. On the contrary, it is a good quality of the officer that despite of having capacity to take quick and sound decisions, he takes guidance of higher officers where he has some doubt in his mind to take a decision. Now the only remarks in the character roll of the petitioner for both the years 1984-85 and 1985-86, is, "needs persuasion to entrust additional responsibility". The petitioner has made a categorical statement in the Special Civil Application that during the aforesaid two years, he was never asked by the respondents to share any additional responsibility. The respondents have also not given out in reply, specific instances when the petitioner was asked to discharge additional responsibility, but he has not shared. In absence of positive instances coming from the respondents on this question, this remark is, on the fact of it, arbitrary. If we go by the remarks minutely and deeply, what it contains is that when the respondents felt necessary to give additional responsibility to the petitioner, he needed persuasion to carry out the same. To establish the correctness and bonafide of this remark, heavy burden lies on the respondents to establish to the satisfaction of the Court that during these two years, the respondents felt necessity to burden the petitioner with additional responsibility on such occasions and on such and such dates and he has undertaken that responsibility only on persuasion. As stated earlier, the respondents have not given out the positive instances of necessity arising for them to entrust additional responsibility to the petitioner. So the very basic bedrock of this remark is not there. In the absence of this foundational fact, the remark is nothing but only an outcome of extraneous consideration and arbitrary approach. Apart from this, the respondents have not given out that at any point of time during these two years, the petitioner has been pointed out his deficiency in his working by the controlling officer in writing and he has been given an opportunity to improve himself. These remarks could have been there only when the necessity would have arisen to give additional responsibility to the petitioner and he had carried out the same only on persuasion by the

respondents, and he has been pointed out this deficiency in writing by the controlling officer and despite of giving opportunity of improvement it persisted. This remark and other remarks for the year 1985-86 need consideration with reference to other facts which have already been discussed in the earlier part of the judgment and on which there is no dispute between the parties. The petitioner has been dealt with at all the stages by the respondents in the matter of his promotion and other service benefits, arbitrarily and for redressal of his grievances, he has approached to this Court from time to time. The respondents, even after the judgments have been given by this Court in favour of the petitioner, have not implemented those judgments, and the benefits for which the petitioner was found entitled by this Court were not extended to him. The judgments could be implemented only when the petitioner has approached this Court by filing Contempt Petition. All the benefits following from the judgments which have been given by this Court in his favour were given to the petitioner only after he was ordered to be compulsorily retired from the service. The petitioner on the last post of Joint Commissioner was not given promotion from deemed date and again he has to come to this Court and the matter has been decided in his favour and respondents then ultimately gave him benefits of deemed date of promotion on this post. The petitioner, as stated earlier, was promoted on the posts where the criteria for promotion was proved merits and efficiency and further he was allowed to cross Efficiency Bar. Not only this, as and when necessity has arisen to share additional responsibility, the petitioner has not only shared the same but has shown his worth and the same has been recognized by the Department. Under these circumstances, it could be characterized that the remarks were not bonafide made in the public interest, and amounted to self-serving statement to weed out the petitioner from services. The Controlling officer has not used due diligence in making remarks. It would have been salutary that the controlling officer before writing such adverse remarks would have given prior sufficient opportunity in writing by informing to the petitioner of the deficiency he noticed for improvement. It should also be mentioned that he had been given prior opportunity in writing for improvement and yet the same was not availed of, so that it would form part of the record. It is advantageous to have reference to the decision of Apex Court in the case of Sukhdeo v. Commissioner Amravati Division, Amravati & Anr., reported in 1996(5) SCC 103. That was also a case of premature retirement of the appellant therein from the services. In that case, entries for the years 1987-88

and 1988-89 were having same remarks. The adverse remarks therein were, "irregular, rarely found at headquarter, poor performance in recovery work, bad in public image...." On the basis of these remarks, the appellant therein was ordered to be prematurely retired in the public interest. The Apex Court, after taking into consideration the remarks given to the appellant therein and particularly in view of the fact that his integrity and character were not reported to be bad, held that the order of compulsory retirement of the appellant therein to be per-se illegal. While dealing with the matter, the Apex Court thus observed that:

It is settled law that when the Government resorts to compulsorily retire a government servant, the entire record of service, particularly, in the last period of service is required to be closely scrutinised and the power would be reasonably exercised. In State Bank of India v. Kashinath Kher (JT (1996)2 SC 569, pg.578 para 15), this Court has held that the controlling officer while writing confidential and character roll report, should be a superior officer higher above the cadres of the officer whose confidential reports are written. Such officer should show objectivity, impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. In that case it was pointed out that confidential reports written and submitted by the officer of the same cadre and adopted without any independent scrutiny and assessment by the committee was held to be illegal. In this case, the power exercised is illegal and it is not expected of from that high responsible officer who made the remarks. When an officer makes the remarks he must eschew making vague remarks causing jeopardy to the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy. In this case, the controlling officer has not used due diligence in making remarks. It would be salutary that the

controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in writing for improvement and yet was not availed of so that it would form part of the record. The power exercised by the controlling officer is per se illegal. The Tribunal has not considered this aspect of the matter in dismissing the petition. The appellant is entitled to reinstatement with all consequential benefits. The appeal is accordingly allowed with exemplary costs quantified at Rs.10,000/- recoverable by the State from the officer who made the remarks.

In the case in hand, as stated earlier, the controlling officer has never pointed out to the petitioner, his deficiency as adversely reported in his confidential report, in writing. The net result of the aforesaid discussion is that the adverse remarks for the year 1984-85 and 1985-86 should not have been taken into consideration for the purpose of forming an opinion that the petitioner is not a fit person to be retained in services in the public interest.

24. Now I may advert to the adverse remarks of the year 1986-87. As stated earlier, these remarks were not communicated to the petitioner and the respondents have given out reason for the same in the reply that the petitioner was ordered to be prematurely retired from 30th August 1987 under the order dated 11th August 1987. Though from the statement filed by respondents regarding the service record of the petitioner and the reply affidavit, it transpires that the only material which has been considered against the petitioner was the adverse remarks of the years 1984-85 and 1985-86, the adverse remarks for the year 1986-87 were not even referred to in the reply and it is also not the case of the respondents that the same have been considered. Inference also follows therefrom that these remarks have not been taken into consideration. However it is no more res-integra that even uncommunicated adverse remarks can be taken into consideration for the purpose of forming the opinion for premature retirement of the employee/officer in the public interest. In view of this fact, the question

arises that whether the matter should be sent back to the authority to consider the case of the petitioner, of premature retirement with reference to the adverse remarks contained in his confidential report of the year 1986-87 or not. After going through these remarks and in view of the position of law as laid down by the Hon'ble Supreme Court in the case of Sukhdeo v. Commissioner, Amravati Division, Amravati & Anr. (supra), I do not consider it to be appropriate to send the matter back to the respondents to consider the impact and effect of the adverse remarks for the year 1986-87. The remarks for the year 1986-87 are as under:

4. Overall assessment including mention of outstanding work, if any.

-- A barely adequate officer. His improvement in controlling his temper is not complete by any means.

Thus, for the year 1986-87, nothing adversity has been reported against the petitioner regarding his integrity, honesty, his relation with public and subordinates, his capacity to take sound and quick decisions, initiative, resourcefulness and willingness to assume responsibilities, capacity for organization and to get the work done from subordinates, character and temperament including relation with fellow officers and general public etc. The remark is "he is barely adequate officer" and further "that his improvement in controlling his temper is not complete by any means". These remarks are vague and difficult to understand what really the respondents want to convey. There must be some positive instances, illustrations and examples on the basis of which an opinion could have been formed that the petitioner is barely an adequate officer. Similarly for the second part of remarks, it is suffice to say that those are also lacking in necessary factual foundation. The remarks have to be considered in the context of the facts and circumstances, which I have discussed in the earlier part of the judgment while dealing with the adverse remarks of the year 1984-85 and 1985-86. Nothing has been produced on record by the respondents that the controlling officer before writing these remarks has given any prior sufficient opportunity in writing to the petitioner, by informing of the deficiency he notices for improvement. In the absence of these exercise, these adverse remarks are bad and arbitrary. The Apex Court has held that only after giving the employee/officer sufficient opportunity for improvement of deficiency noticed, even thereafter if there is no improvement, then

only the adverse remarks could be given. The remarks affect the employee/officer in many ways. It results in premature retirement that is to say, his tenure of employment is likely to be reduced and as such, such remarks should have been given only after giving the concerned employee/officer sufficient opportunity for improvement of deficiency noticed in his performance of duties. That precisely has not been done in the present case while recording the adverse remarks in the confidential report of the petitioner of the year 1986-87. Under these circumstances, it could be characterized that these remarks were not bonafide, and made in public interest, but amounting to self-serving statement to weed out the petitioner from services.

25. In the result, this Special Civil Application succeeds and the same is allowed. The order dated 11th August 1987, annexure 'K' to the Special Civil Application, is quashed and set aside. The petitioner shall be entitled for all consequential benefits following from the quashing of the aforesaid order. All consequential benefits should be given to the petitioner within a period of three months from the date of receipt of writ of the order by respondents. The respondents are further directed to pay to the petitioner, Rs.2,000/- by way of costs of this Special Civil Application. Rule is made absolute in aforesaid terms.

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